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Supreme Court of the United States.

OCTOBER TERM, 1943.

FRANK W. LYMAN ET AL., EXECUTORS,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

AMOS L. TAYLOR,
Attorney for Petitioners.

FRED J. JOHNSON,
JOHN F. DOHERTY,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioners, pray that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the First Circuit, rendered on October 18, 1943, in the case of *Frank W. Lyman et al., Executors* (*Defendants, Appellants*), v. *United States of America* (*Plaintiff, Appellee*).

Opinions Below.

The opinion of the Circuit Court of Appeals appears at pages 27 and 28 of the Record, and is not reported. A former opinion was reported at 125 Fed. (2d) 67.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on October 18, 1943 (R. 27). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U.S.C. Section 347.

Statement of the Matters Involved.

The case involves the first cause of action only. According to the declaration (R. 3), the income tax was assessed May 25, 1931 (R. 4). The writ is dated May 18, 1938 (R. 2). The defendant pleaded the Statute of Limitations (R. 8), the action being obliged to be brought within six years of the date of the assessment. At the opening of the trial of the case in the District Court, counsel for the plaintiff there stated (R. 20): "As to the first cause of action, it appears on the face of the complaint that this suit is not timely with respect to that cause of action"; and then continued further: "We therefore, with the permission of the court, withdraw that cause of action from this suit. I believe that a stipulation will be entered into between the parties withdrawing that cause of action, and that it is not before the Court."

No stipulations were filed. Upon completion of the actual trial of the case counsel for defendant stated to the Court (R. 21 and 22):

> "[Counsel for defendant.] May it please your Honor, as I understand it now we are going to prepare something that is going to be equivalent to the dismissing and final adjudication of count 1.
>
> "The Court. I understand count 1 has been waived.
>
> "[Counsel for plaintiff.] It has been withdrawn.

"[Counsel for defendant.] I understood we were going to file some stipulations.

"The Court. You can if you want. You don't need to. Count 1 is clear out of this case."

No stipulations being filed, the defendant then made a motion (R. 8) for a directed verdict. The Court then stated (R. 22): "If that count is not before the court how could you properly ask me to make a finding with reference to it if it is not before me?" On December 13, 1940, the District Court gave judgment (R. 9), but it made no reference to the first cause of action.

On March 28, 1941, the defendant filed a motion (R. 10) stating that, by error or oversight, the Court had failed to give judgment for the defendant, and moved that the Court order judgment. On March 31, 1941, the Court gave judgment (R. 11) to the defendant on the said cause of action. On April 28, 1941, the plaintiff moved to vacate this judgment (R. 11). The Court, on May 13, 1941, dismissed the said motion to vacate (R. 14).

The plaintiff then appealed to the Circuit Court of Appeals and set out in the appeal a statement of points (R., separate sheet) as follows:

First: That the District Court erred in granting *ex parte* the order entered March 28, 1941, granting appellees' motion for judgment on the first cause of action, in that appellees' motion to amend said judgment was made more than ten days after the entry thereof and the District Court was without jurisdiction to grant said motion and to amend said judgment.

Second: That the District Court erred in denying appellant's motion to vacate the order entered March 31, 1941, granting appellees' motion to amend the judgment entered

on December 13, 1940, for the reason the said order entered on March 31, 1941, was without authority of law and was beyond the jurisdiction of the District Court.

The Circuit Court of Appeals, in the opinion reported at 125 Fed. (2d) 67, remanded the case to the District Court with leave to the plaintiff to move under the Federal Rules of Civil Procedure, Rule 41 (a) 2, to dismiss the cause of action, and, in the same opinion, vacated the amended judgment entered March 31, 1941 (R. 11). With the authority from the same opinion, the plaintiff, on May 18, 1942 (R. 14), moved to dismiss the action.

The Court, on June 19, 1942 (R. 15), allowed the motion dismissing the first cause of action "with prejudice to any action upon the first cause of action in its declaration that may hereafter be commenced, but without prejudice to the right of the plaintiff to prosecute any other timely proceeding upon the subject matter now pending in another court." The timely proceeding therein referred to is one based on the same cause of action between the same parties pending in the Probate Court for the County of Middlesex, Massachusetts (R. 13).

The defendant appealed to the Circuit Court of Appeals, and, in an opinion not reported (R. 27), the Court there stated they saw no error in the exercise of its discretion by the trial Court in dismissing the action.

Question Presented.

Did the District Court, in acting on the motion of the plaintiff, have the discretionary power to dismiss, conditional or otherwise?

Reasons for Granting the Writ.

1. The Court did not have the discretionary power to dismiss because, first, it was apparent from the record that the Statute of Limitations applied; the plaintiff admitted the action was not timely brought, and stated he believed a stipulation would be entered, and that the action was not before the Court. As far as the Court was concerned, the withdrawing was conditional upon the entry of a stipulation, without the entry of which the Court was bound to dispose of the action based on the merits as they were before the Court at the time of entering judgment.

2. With the plea of the Statute of Limitations applying, and the admission by the plaintiff that the action was not timely brought, the case had then progressed so far as to entitle the defendant to judgment.

3. The jurisdiction was created by legislative act of Congress, and the Court could not then refuse to exercise jurisdiction when it was invoked by appropriate proceedings.

4. The Court, in refusing to take jurisdiction, has deprived the plaintiff of property and rights without due process of law.

5. The Federal Rules of Civil Procedure relate to pleading, practice and procedure and do not affect substantive rights. Statutes of Limitations are matters of substantive law, and the defendant cannot be denied a substantive right.

6. The Federal Rules of Civil Procedure, Rule 41 (a) 2, do not give the Court arbitrary power to dismiss; said rule has not enlarged the discretionary power of the Court to dismiss; it merely refers to method and manner.

7. The Circuit Court of Appeals, in the case reported 125 Fed. (2d) 67, erred in vacating the judgment after the

District Court, acting on a motion to vacate, had refused to vacate the judgment.

8. According to the Massachusetts General Laws, Chapter 198, a judgment in the District Court would have been *res adjudicata* in the case pending in the Probate Court of Middlesex County, Massachusetts, and the defendant was entitled to a judgment as a matter of right.

Wherefore it is respectfully submitted that the petition should be granted.

AMOS L. TAYLOR,
Attorney for Petitioners.

FRED J. JOHNSON,
JOHN F. DOHERTY,
Of Counsel.